

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Revision of Rules and Policies for the - )  
Direct Broadcast Satellite & Services )  
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IB Docket No. 95-168

PP Docket No. 93-253

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**NYNEX COMMENTS**

NYNEX Corporation, on behalf of its subsidiaries (collectively "NYNEX"), hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM"), released October 30, 1995, in the above-referenced proceeding. In the NPRM, the Commission proposes new rules for reassigning Direct Broadcast Satellite ("DBS") resources and for DBS service generally.<sup>1</sup> NYNEX focuses its comments on the proposed new service rules. Specifically, we address those rules restricting the relationship DBS service providers can establish with other Multichannel Video Programming Distributors ("MVPDs").

<sup>1</sup> The specific DBS resources available for reassignment at this time are the 51 channels reclaimed from Advanced Communications Corporation for failing to proceed with due diligence toward the construction and operation of its DBS system. Advanced Communications Corporation, FCC 95-428 (adopted October 16, 1995).

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The Commission has articulated the following “three important public policy goals for the DBS service:

- (1) efficient use of a valuable public spectrum resource (DBS channels);
- (2) promotion of DBS as a competitor to cable television systems; and
- (3) prompt delivery of DBS service to the public”.<sup>2</sup>

In establishing new DBS service rules that will advance these goals, the Commission must recognize that, among all MVPD providers, only incumbent cable television systems (CATV) possess market power. Therefore, rules that “balkanize” all other MVPD media (e.g., DBS, MMDS, VDT) into segregated and isolated ventures which cannot provide effective marketplace competition to the increasingly consolidated, national CATV companies could thwart the Commission’s express goals. Yet, as discussed below, this could be the direct result of proposed DBS service rules that would penalize providers for, or prohibit entirely, certain relationships with MVPD entities other than incumbent CATV companies. The consequent limitation of the prospects for a competitive video services marketplace would be poor policy indeed.

**I. ONLY THE INCUMBENT CATV SYSTEMS HAVE MARKET POWER**

The Commission expresses concern that DBS service not be controlled by an MVPD that already has market power in the provision of video programming. Its

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<sup>2</sup> NPRM at para. 14.

primary concern here, as in the referenced Tempo II case,<sup>3</sup> is focused on not allowing incumbent CATV systems to control the provision and marketing of DBS service.

However, of all the potential MVPDs, only the incumbent CATV providers have any measurable power. As the Commission observed in the 1994 Cable Competition Report, “At present, competitive rivalry in most multichannel video programming markets is largely, often totally insufficient to constrain the market power of incumbent cable systems.”<sup>4</sup> In the NPRM itself, the Commission observes that:

while MVPDs using technologies other than cable are emerging, local markets for the distribution of video programming remain highly concentrated, with cable systems continuing to have market power. At present, therefore, cable operator acquisition of resources that are essential inputs of non-cable distribution technologies gives us pause to the extent it may have the effect of further concentrating this market, and further enhancing cable operator market power. Indeed, we have consistently sought to promote effective competition to the services provided by cable systems, and we have encouraged the development of the DBS spectrum in precisely that context. (footnotes omitted)<sup>5</sup>

It is only when the concerns expressed by the Commission regarding the relationships between DBS and MVPDs are applied to incumbent CATV companies

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<sup>3</sup> Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) (“Tempo II”). It is noteworthy that, in Tempo II, the Commission ultimately allowed the cross-ownership of DBS resources by CATV providers subject to certain conditions. Although the Commission may find the time appropriate to change this ruling for incumbent CATV systems (NPRM at para. 40), there is far less to fear and much to gain from relationships between MVPDs which lack the market power of CATV systems then or now. *Infra* § II.

<sup>4</sup> See 1994 Cable Competition Report, 9 FCC Rcd at 7449-50.

<sup>5</sup> NPRM at para. 36.

that those concerns are valid. For example, the Commission observes that “[f]ailure of DBS systems to provide competition to other MVPD systems will be felt particularly in those markets where a DBS operator may be affiliated with a non-DBS MVPD”<sup>6</sup>.

However, the observation is valid only when the “MVPD” sheltered from competition is the incumbent CATV system with all, or substantially all of the customer base.

Conversely, the competitive effects of a relationship between the distant second-tier competitor DBS service and an equally distant non-CATV MVPD service would be “felt” only if the relationship enhanced their individual competitive abilities and thus resulted in a market which was more competitive, not less.

It would be truly ironic in this proceeding -- required by the failure of a DBS licensee to develop its system after many years -- if DBS providers generally were barred or dissuaded from forming relationships with non-CATV entities which might make them better able to provide “*effective competition to the services provided by cable systems*”, as envisioned in the Commission’s goals. A reasoned approach to the video services market structure and its own statutory mandate require that the Commission distinguish between entities with and without market power as it seeks to encourage a competitive services market.<sup>7</sup> It should do so here by clearly distinguishing prospective video services providers from incumbent CATV systems.

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<sup>6</sup> NPRM at para. 34.

<sup>7</sup> See, e.g., the requirement that the Commission address factual market realities in its rules for PCS and cellular services, recently enunciated in Cincinnati Bell Telephone, et al. v. FCC, Nos. 94-3701/4113, 1995 Fed App. 0326P (6th Cir.), decided November 9, 1995.

## **II. DBS PROVIDERS AND OTHER MVPD PROVIDERS SHOULD NOT BE PRECLUDED FROM COMPETITION-ENHANCING RELATIONSHIPS**

Neither the Commission nor the nascent DBS providers and other prospective MVPDs yet know the most effective means for competing with the incumbent CATV companies. What is known is that there is no effective competition to those companies today. It is further clear that, whatever the Commission's highest hopes for developing video services competition from any other media, none of these entities have any meaningful market share today and some -- like video dial tone -- have no market share whatsoever.<sup>8</sup> DBS itself, which is the focus of this proceeding, can best be described as a fledgling service. The best evidence of the competitive effect of DBS service in today's marketplace can be found in the statements of the CATV operators themselves:

DBS hasn't been major competitor to cable, speakers [at an industry conference held in New York City] said. Helicon COO Gregory Kriser said his MSO has lost 0.25% of its subscribers to all types of satellite dishes in last 2 years, and Charter Communications Chmn. Barry Babcock put figure at "less than 0.5%," plus "a few" subscribers who downgraded to basic and replaced expanded basic with DBS. "DBS has actually helped cable sales," Babcock said. "They've spent over \$100 million promoting cable programming. I appreciate that."<sup>9</sup>

Notwithstanding these facts, the Commission is considering establishing rules that would penalize or prohibit DBS providers from forming relationships with other potential MVPDs. For example, DBS providers might be penalized for "affiliating"

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<sup>8</sup> 1994 Cable Competition Report, *supra*.

<sup>9</sup> Communications Daily, September 21, 1995 at 5.

with non-DBS MVPDs (irrespective of whether the MVPD is the incumbent CATV provider)<sup>10</sup> and might be prohibited from certain marketing arrangements altogether.<sup>11</sup> Importantly, these penalties and prohibitions would preclude the DBS providers from entering into such voluntary relationships that they believe are necessary to compete with the incumbent CATV systems. These proposed rules would also prevent the association of technologies that may be necessary to give rise to effective competition, as in the potential for Headend-In-The-Sky (“HITS”) architectures.<sup>12</sup> In this regard, they are likely to frustrate the Commission’s own goal of “*efficient use of a valuable public spectrum resource.*” Most importantly, the rules would restrict the alternatives for the development of a strong competitor at a time when there is no competition at all.

Further, the rules under consideration are also more than likely to delay the Commission’s final goal, “[*the*] prompt delivery of DBS service to the public,” as they impede the developmental needs of new licensees and fledgling DBS competitors. In addition, any such rules will diminish the value of the 51 channels to be auctioned because they will constrain the interest or eligibility of bidders and the development of the systems to be licensed. In doing so, they would serve to frustrate a key public

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<sup>10</sup> Thus, any DBS licensee or operator affiliated with another MVPD would be permitted to use DBS channel assignments at only one of the orbital locations capable of full-CONUS transmission. NPRM at para. 40. This penalty applies with equal force to incumbent CATV providers and neophyte MVPDs attempting to pry open the incumbent’s market through alternate technologies such as MMDS or VDT.

<sup>11</sup> NPRM at paras. 55-56.

<sup>12</sup> NPRM at para. 61.

interest factor in the pending auction: "recovery for the public of a portion of the value of the public's spectrum resource made available for commercial use."<sup>13</sup> It has been three years since the Commission considered these issues in the Tempo II case. At that time, the Commission found good reasons to allow some integration of technologies in order to provide service to the public. Those reasons continue to support alliances of marketing and technology that will provide a second competitor in the marketplace.

In sum, there are both DBS service-enhancing and spectrum value-enhancing reasons for the Commission to determine that its rules should not impose penalties and prohibitions on DBS relationships with MVPDs which are not CATV incumbents.

### **CONCLUSION**

NYNEX appreciates this opportunity to offer its Comments in this proceeding and urges the Commission's favorable consideration of its views.

Respectfully submitted,

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<sup>13</sup> NPRM at para. 14.